Supreme Court, U.S.
FILED
SEP 29 2000
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No. 00-201

IN THE
Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.;
THE TIME INCORPORATED MAGAZINE COMPANY;
LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,
Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY;
BARBARA GARSON; MARGOT MIFFLIN;
SONIA JAFFE ROBBINS and DAVID S. WHITFORD,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals For the Second Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS TASINI, BLAKELY, MIFFLIN AND WHITFORD

PATRICIA A. FELCH, ESQ
Counsel of Record
BANNER & WITCOFF, LTD
10 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 715-1000

DANIEL W. SHERRICK
8000 East Jefferson Ave.
Detroit, MI 48214
(313) 926-5216

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

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TABLE OF CONTENTS

	Page
STATEMENT OF STATEMENT OF THE CASE.....	1
REASONS FOR DENYING THE WRIT.....	6
CONCLUSION.....	16

TABLE OF AUTHORITIES

Cases: Page

Greenberg v. National Geographic Society, No. 97-3924-civ, 1998 Dist. LEXIS 18060 (S.D. Fla. May 14, 1998) 7

Ryan v. Carl Corp., 23 F. Supp. 2d 1146 (N.D. Cal. 1998) 7

Statutes:

17 U.S.C. § 101 2

17 U.S.C. § 103(b) 9

17 U.S.C. § 201(c) ..... *passim*

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Respondents Jonathan Tasini, Mary Kay Blakely, Margot Mifflin and David Whitford, represented by Patricia A. Felch as Counsel of Record before this Court, submit the following Brief in Opposition. Respondents Barbara Garson and Sonia Jaffe Robbins are separately represented and, we understand, will be submitting a separate Brief in Opposition.

STATEMENT OF THE CASE

Respondents are six freelance authors ("Authors") who write articles for a variety of periodicals. Between 1990 and 1993, Authors wrote 22 features, book reviews and news articles ("Articles"), on a freelance basis, and submitted those

Articles for first publication in the periodicals published by certain respondents. Those publishers then re-licensed Authors' Articles for electronic duplication in certain on-line and CD-ROM services ("Databases"). Thus, Petitioners fall into two categories: (1) three publishers of the periodicals in which the Authors' Articles were first published ("Publishers"); and (2) two producers of electronic databases in which certain material originally appearing in those periodicals, including Authors' Articles, is electronically reproduced ("Database Producers").

Authors registered their own copyrights in each of the Articles. (Pet. App. 3a)

The periodicals at issue contain individually-copyrighted works, such as those written by the Authors, as well as materials written, photographed or otherwise created by Publishers' employees on a "work-made-for-hire" basis. The periodicals thus constitute "collective works" under 17 U.S.C. § 101.

The contractual practices of the Publishers and freelance Authors in this case were mixed. In some cases, Publishers failed to negotiate or obtain from Authors any express transfers of copyright or licenses to re-publish submitted Articles. In these situations, as the Second Circuit found, the Authors and Publishers would "negotiate due-dates, word counts, subject matter and price; no express transfer of rights under the Authors' copyright was sought." (Pet. App. 3a) In the case of one respondent, an express licensing agreement was negotiated. That agreement granted the publisher the "right first to publish the Story in the Magazine," and the "right to license the republication of the Story . . . provided that the Magazine shall pay to [him] fifty percent [] of all net proceeds it receives for such republication." (Pet. App. 18a). Other respondent Publishers imposed legends in the endorsement spaces of checks issued to Authors in payment for first publication of their Articles. Publishers argued below that those Authors who signed the legends thereby

expressly transferred the Author's copyrights to Publishers. (Pet. App. 3a n.1) Finally, since this litigation was filed, at least one respondent has adopted the practice of requiring freelance writers to "execute an express transfer of copyrights." *Id.*

Petitioner Publishers provided copies of respondent Authors' Articles, in exchange for cash, to a variety of other parties, including the petitioner Database Producers. Petitioner Database Producers are in the business of selling that material to the public.

In order to prepare the material for transmission to the Databases, Publishers begin with an individual issue of their periodical. In the case of petitioners New York Times and Mead, that individual issue is then:

> stripped, electronically, into separate files representing individual articles. In the process, a substantial portion of what appears in that particular issue of the periodical is not made part of the file transmitted to Mead, including, among other things, formatting decisions, pictures, maps and tables, and obituaries. Moreover, although the individual articles are 'tagged' with data indicating the section and page on which the article initially appeared, certain information relating to the initial page layout is lost, such as placement above or below the fold. . . (Pet. App. 4a)[1]

The Publishers thus did not merely sell "electronic copies" of particular issues of their periodicals, as repeatedly claimed by petitioners. Instead, the Publishers sold the Articles

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[1] The other petitioner Database Producer, University Microfilms International (UMI), operated pursuant to agreements with the New York Times and Mead and sold CD-ROMs containing these "stripped" files. In the case of some ancillary publications, such as the New York Times Sunday Magazine and Book Review, UMI also received and re-sold "image based" files accessible only through text-based indexes provided in CD-ROMs separate from the "image based" files.

originally written by respondent Authors, divorced from the contextual material that originally appeared in the periodical.

The Second Circuit, in a decision written by Chief Judge Winter, and joined by Judges Miner and Pooler, addressed each of the different contractual arrangements at issue between the Publishers and the Authors and reached the following conclusions:

(a) With respect to those arrangements in which no written contract applied, the Second Circuit found that the "gist of the Authors' claim is that the copyright each owns in his or her individual articles was infringed when the Publishers provided [those articles] to the electronic databases." (Pet. App. 5a). In those circumstances, petitioners argued "that the Publishers own the copyright in the 'collective works' that they produce and are afforded the privilege, under Section 201(c) of the [Copyright] Act of 'reproducing and distributing' the individual works in 'any revision of that collective work.' 17 U.S.C. § 201(c)." (Pet App. 5a)

After reviewing the language of Section 201(c) and related provisions of the Copyright Act, the Second Circuit held that the presumed "privilege" set out in Section 201(c) for publishers of "collective works" to distribute "revision[s]" of those collective works did not permit the Publishers to take the Articles at issue here, strip them of their contextual information, and re-sell those Articles to Database Producers.[2]

(b) In the case of the written licensing agreement at issue between respondent Whitford and petitioner Time, Inc. ("Time"), the Second Circuit held that the "first publication" rights described in that agreement did not authorize the Publisher there to re-license the Articles at issue to the Database Producers. That agreement also provided for

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[2] Petitioners had originally pled "fair use" as an affirmative defense, but did not press that argument in either the district court or the Second Circuit.

certain payments to be made to the Author by Time if Time "license[d] the republication of Story" (Pet. App. 18a) Because Time did not make the payments called for in that portion of the agreement, it did not argue below that its conduct was permitted by that provision of the contract. (Pet. App. 20a n. 5)

(c) In the case of the check legends, the Second Circuit noted that the Publishers which had adopted that practice did not appeal the district court's finding that such legends were insufficient to constitute an "express transfer" of the copyright. The Second Circuit also noted that it "substantially agree[d]" with the analysis of the district court in that regard. (Pet. App. 3a n.1)

Thus, the Second Circuit held that none of the contracts between the Publishers and the Authors effectively granted the Publishers the right to re-license the Articles at issue to the Database Producers. The court also held that the Publishers' re-licensing of the Authors' Articles was not within the presumed "privilege" spelled out in Section 201(c).

Based on these findings, the Second Circuit remanded the case to the district court with instructions to enter judgment for the Authors on these issues. (Pet. App. 22a) The Second Circuit did not discuss the issue of appropriate damage relief. Instead, the district court on remand will presumably make a determination regarding what, if any, damages or other relief should be ordered.[3]

Following denial of petitioners' Motion for Rehearing En Banc, the Panel granted petitioners' motion to stay the mandate, and thereby delayed the remand to the district court.

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[3] Petitioners indicated in their motion to stay the mandate that they would also be presenting a variety of additional affirmative defenses once the matter returns to district court. It therefore appears to be petitioners' position that no damages or other relief should be ordered by the district court at all. Of course, the results of petitioners' efforts in that regard remain to be seen.

Counsel for two of the respondent Authors also urged that the mandate be stayed, in order to avoid having to litigate on two fronts simultaneously.

REASONS FOR DENYING THE WRIT

The blizzard of arguments offered by petitioners obscures three important points.

First, Chief Judge Winter's carefully-reasoned opinion for the Second Circuit is nothing more than a garden-variety exercise in statutory and contract construction, on an issue which has not been addressed by any other federal appellate court. Given the lack of conflict in the circuits on this issue, there is simply no reason for this Court to review the Second Circuit's construction of the contracts or statutory provisions at issue here.

Second, the Second Circuit remanded the case to the district court for further proceedings. No remedial orders have been issued, and the issue of remedies has not yet even been raised or briefed in the district court. Thus, petitioners' statement that the "Second Circuit's decision ... forces the destruction of large volumes of constitutionally protected material," Pet. 17, is entirely inaccurate. In fact, petitioners made clear in their motion to stay the mandate that they will be arguing a variety of additional affirmative defenses at the district court on remand, apparently in support of their position that no damages or other relief should be ordered at all. Of course, those issues, as well as respondent Authors' claims for damages, have not yet been briefed in—let alone decided by—the district court. And when they are, they will be subject to the normal appeal processes. There is no reason for this court to intervene at this stage in the proceedings based on petitioners' predictions regarding remedial issues that have been neither raised nor addressed in the district court.

Finally, even assuming that the district court eventually awards some form of damages to the six freelance authors here, and even assuming that petitioners and other publishers seek to avoid the imposition of damages on similar theories in future situations, the resulting scenario would not require the wholesale destruction of historical records predicted by petitioners. Instead, the only consequence of that scenario would be to encourage publishers to obtain express permission to re-license material obtained on a freelance basis before engaging in re-licensing of that material. As the variety of contractual arrangements reviewed in this case shows, publishers and authors are perfectly well equipped to reach agreement on a range of issues, including re-licensing.

We discuss each of these points, and respond to petitioners' other arguments, below.

1. A. There is no disagreement among the federal appellate courts on the contractual or statutory issues decided below. Indeed, other than the present case, not a single court of appeals has addressed either the contractual or statutory interpretation issues decided by the Second Circuit here. And the two district court decisions touching on these issues are entirely consistent with the decision of the Second Circuit here.[4]

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[4] In one decision, which even petitioners acknowledge is consistent with the Second Circuit's decision here, a district court for the northern district of California held that the 201(c) privilege did not permit a publisher to sell photocopies of articles that had originally appeared in "collective works" of the publisher, in the absence of the consent of the authors of those articles. *Ryan v. Carl Corp.*, 23 F. Supp. 2d 1146 (N.D. Cal. 1998). That decision—like the decision here—holds that the sale of individual articles (even if done in connection with the sale of other articles appearing in the same "collective work") is not a permitted "revision" of the collective work.

In another, unpublished, decision from the southern district of Florida, *Greenberg v. National Geographic Society*, No. 97-3924-civ, 1998 U.S. Dist. LEXIS 18060 (S.D. Fla. May 14, 1998), the district court held that

B. Faced with this lack of conflict in the lower courts, petitioners advance two rather remarkable arguments.

First, petitioners argue that this Court's standard for grants of certiorari has been relaxed in the context of copyright matters. (Pet. 10-11) In support of this position, petitioners cite five intellectual property decisions of this Court. (Pet. 10 n. 5) Of course, not a single word in those decisions indicates that the standard for certiorari grants in copyright cases is any different than that in any other type of case.

Second, petitioners repeatedly claim that the Second Circuit's decision to stay the mandate in this case somehow implies that the judges of that circuit concluded that the case was worthy of review on certiorari. (Pet. 8-9, 15-16) After the Second Circuit denied petitioners' motion for en banc consideration of the Panel's decision, the Panel ruled on petitioners' Motion to Stay the Mandate, thus granting a delay in the remand of the matter to the district court for what could be a lengthy trial on damage issues. Counsel for two of the respondents Authors, in fact, joined petitioners in urging that stay, in order to avoid having to litigate the same case on two fronts simultaneously. The Second Circuit's single-sentence decision granting the stay of the mandate—urged by the Publishers and consented to by two of the Authors—says nothing at all about the matter being worthy of certiorari. (Pet. App. 110a)

C. The petition for certiorari is largely devoted to petitioners' attempt to re-argue the merits of the decision below. In so doing, petitioners torture the analysis of Chief Judge Winter beyond all recognition. As we now show, the

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the privilege set out in Section 201(c) permitted the National Geographic magazine to distribute electronic versions of that periodical. That holding was based on both (1) that court's finding that the electronic versions contained an "exact image of each page as it appeared in the Magazine," and (2) that court's reliance on the district court opinion in the instant case, which the Second Circuit has now reversed and remanded. That decision is pending on appeal at the 11th Circuit.

Second Circuit's analysis was entirely straight-forward and exhibits none of the infirmities attributed to it by petitioners.

There is no dispute regarding the basic statutory framework. Thus, in the case of "collective works" such as the Publishers' periodicals, the "[c]opyright in each separate contribution to a collective work is distinct from copyright in the collective work as a whole, and vests initially in the author of the contribution." 17 U.S.C. § 201(c). Moreover, "[t]he rights of the author of a collective work are limited to 'the material contributed by the [collective-work] author'." (Pet. App. 9a, quoting 17 U.S.C. § 103(b)). Finally, it is beyond dispute that the rights of publishers of collective works, i.e., periodicals, do not extend to the "preexisting material," i.e. the original articles. 17 U.S.C. § 103(b).

Given that background, it is undisputed that the publisher of a collective work such as the periodicals at issue here may obtain the right to re-license or re-sell freelance contributions only in one of two ways: by an express transfer of that right from the author, or by operation of the presumed "privilege" set out in Section 201(c). Thus, Section 201(c) provides:

> [i]n the absence of an express transfer of the copyright or of any rights under it, the owner of the copyright in the collective work is presumed to have acquired only the privilege of reproducing and distributing the contribution as part of that particular collective work, any revision of that collective work, and any later collective work in the same series.

With that much as common ground, the Second Circuit examined the contract between petitioner Time and respondent Whitford, under which Time obtained the right "first to publish the Story in the Magazine." (Pet. App. 18a) The Second Circuit concluded that those provisions did not constitute an "express transfer of the copyright" permitting the re-licensing of Whitford's Article to the Database Producers. (Pet. App. 20a) Petitioners do not appear to

quarrel with that holding.[5] Nor do Petitioners appear to quarrel with the Second Circuit's disposition of the issue regarding the "legends" that petitioner Newsday affixed to the checks. As the Second Circuit noted, Newsday did not appeal from the district court's decision that those legends did not constitute an express transfer of copyright. (Pet. App. 3 n. 1)

The petition thus appears limited to those petitioners and respondents who "negotiate[d] due-dates, word counts, subject matter and price" but who failed to come to any understanding about republication rights. For this group, the Second Circuit summarized the dispute as follows:

> The gist of the Authors' claim is that the copyright each owns in his or her own individual articles was infringed when the Publishers provided them to the electronic databases. Appellees do not dispute that the Authors own the copyright in their individual works. Rather, they argue that the Publishers own the copyright in the 'collective works' that they produce and are afforded the privilege, under Section 201(c) of the Act, of 'reproducing and distributing' the individual works in 'any revision of that collective work.' 17 U.S.C. § 201(c). The crux of the dispute is, therefore, whether one or more of the pertinent electronic databases may be considered a 'revision' of the individual periodical issues from which the articles were taken. (Pet. App. 5)

The Second Circuit proceeded to apply traditional tools of statutory interpretation to reject the Publishers' argument that their re-sale of the original Articles to the Database Producers was a privileged "distribut[ion] [of] the contribution as part of . . . any revision of that collective work." 17 U.S.C. § 201(c).

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[5] Another provision of the contract between Time and Whitford permitted Time to "license the Story for republication" if Time paid Whitford "50 percent [] of all net proceeds it receives for such republication." (Pet. App. 18a) Petitioners do not attempt to invoke that portion of the contract because Time did not make the payments called for there.

There is nothing remarkable about the Second Circuit's analysis in this regard. In fact petitioners do not directly attack the Second Circuit's statutory analysis although it is entirely dispositive of their claims.

D. Petitioners' attempts to re-argue the merits of the case consist of their claim that the Second Circuit's decision "conflicts with two important principles of copyright law," namely that "third party conduct is irrelevant to a direct infringement claim," and that "'mechanical' reproduction of a work (as opposed to one adding some element of 'originality') cannot create a new, copyrightable work." (Pet. 18, 9) Both of those arguments are entirely inapposite.

The Second Circuit's decision, of course, was not based on "third party conduct." As just described, the Second Circuit found that Publishers who hold the copyright in a "collective work" were not privileged to re-sell the original articles to the Database Producers. No third party conduct is involved in that analysis at all. In fact, the only reference to "third party conduct" in the Second Circuit's decision is a passing reference to the inability of database users to reconstruct any semblance of the original collective work, used to demonstrate that the re-sale by the Publishers involved the "preexisting material" (in which the Authors hold a copyright) as opposed to the "collective work" (in which the Publishers hold a copyright as to the coordination, format and layout) (Pet. App. 15a-16a)

Petitioners thus mischaracterize the Second Circuit's decision when they claim that the Second Circuit held that "direct infringement liability may be imposed based solely on the ability of end users to cherry pick" the articles in question. (Pet. 23) As the Second Circuit's decision makes clear, it is not the conduct of the end-user which is at issue. Instead, the issue decided by the Second Circuit was whether the Publishers' re-sale of the original articles to the databases was a permitted distribution of a "revision" of a particular issue of the periodical in which the original article first appeared.

To support their claim in this regard, petitioners repeatedly characterize the material sold to the Database Producers as "electronic copies" of particular issues of the periodicals containing the original articles. (*See*, Pet. 2, 4, 6, 7, 18-22, 26-27) As described by the Second Circuit, in contrast, the material sold by the Publishers to the Database Producers consisted, in most instances, of the individual, original articles stripped of everything else contained in the "collective work."

The second "conflict" urged by petitioners is equally fanciful. Petitioners claim that the Second Circuit found that the Databases constituted "new works" which themselves could be copyrighted, and that this holding conflicts with the principle that "mechanical reproduction" of existing works does not create "new works." (Pet. 26)

Again, petitioners are simply incorrect in characterizing the Databases as "mechanical" or "electronic" copies of the original issues of the periodicals at issue. (Pet. 26-27) Petitioners are also incorrect in characterizing the Second Circuit as holding that the "coding, searchability and digitization" of the "electronic copies" were the factors that resulted in the databases being "new works," as opposed to permitted "revisions" of the original collective works. (Pet. 27) As the Second Circuit found, virtually all of the material in which the Publishers hold a copyrightable interest in the original collective works, e.g., the arrangement of the articles within the original collective work, and the formatting and design of the periodicals, is stripped away before the Publishers sell the original articles to the Database Producers. This factual finding—crucial to the Second Circuit's decision—is entirely ignored by petitioners.

Another persistent theme in the petition is that the Second Circuit's decision is worthy of review because it somehow is premised on an "artificial approach to paper versus electronic copies" and a holding that electronic transmission is different than "hard copy" transmission. (Pet. 20.) With this device,

petitioners seek to portray this case as one involving an "emerging technology" in which the Second Circuit failed to apply the provisions of the Copyright Act in a "media neutral" manner.

Of course, the Second Circuit's decision is entirely "media neutral." The Second Circuit did not hold that "electronic copies" of periodicals are to be treated differently from "paper copies." In fact, precisely the opposite is the case. As the Second Circuit stated:

> Section 201(c) would not permit a Publisher to sell a hard copy of an Author's article directly to the public even if the Publisher also offered for individual sale all of the other articles from the particular edition. We see nothing in the revision provision that would allow the Publishers to achieve the same goal indirectly through NEXIS. (Pet. App. 13a)

2. Given the lack of conflict in the lower courts, as well as the strength and clarity of the Second Circuit's contractual and statutory analysis, petitioners are forced to resort to colorful predictions of evils that—according to petitioners—will occur if the decision below is allowed to stand.

To take only a few examples, petitioners claim that the decision below will result in "wholesale destruction of CD-ROMs," (Pet. 2); prohibit "historians, students, scholars, and others [from] enjoy[ing] ready access to the complete historical record of the nation's periodicals," (Pet. 14); result in "disast[er] for the nation's libraries, academic institutions and publishers," (Pet. 14); require "massive destruction of constitutionally protected information," (Pet. 17); and, finally, "leave[] no choice other than to take irreversible, information-destroying steps," (Pet. 17).

Petitioners' concerns are, to say the least, overstated. The Second Circuit's decision does not mandate the destruction of any information. In fact, the decision below contains not a hint about the scope of an appropriate remedial order. Rather,

the issue of remedies for the infringement of the 22 articles by the six authors involved in this litigation is left entirely to the district court.

Thus, petitioners' speculation about the impact of the eventual remedial order in this case is just that—speculation. The issue of an appropriate remedy for the 22 infringements at issue in this case has not even been briefed in—let alone decided by—the district court. In fact, petitioners have indicated that they will be presenting a variety of additional affirmative defenses to the district court, presumably in support of a position that no remedy at all should be ordered. Until the district court makes additional factual inquiry, and reviews the arguments of the parties, it is premature to speculate about the potential impact of any set of remedies that may be ordered in the future by the district court. And, of course, once the district court reviews the additional factual and legal material presented by the parties on remand and makes a determination as to what, if any, damage relief is appropriate, either party will have the right to pursue the normal appellate steps.

3. Finally, petitioners' dire—and premature—predictions regarding possible consequences of the Second Circuit's decision are entirely inaccurate. Those predictions ignore the salutary—and far more likely—result of the Second Circuit's decision: encouraging publishers and authors to enter into agreements making clear the scope of the rights transferred to the publisher.

As the Second Circuit stated:

> Publishers and authors are free to contract around the statutory framework. Indeed, both the Publishers and Mead were aware of the fact that Section 201(c) might not protect their licensing agreements, and at least one of the Publishers has already instituted a policy of expressly contracting for electronic re-licensing rights. (Pet. App. 17a)

In response to this observation, petitioners claim only that there would be "logistical difficulties" in obtaining the consent of the authors as required by the Copyright Act. (Pet. 16) Of course, such a claim has a hollow ring, since it is essentially a claim that the sheer volume of the prior violations makes future compliance difficult.[6]

Petitioners' concerns about the inability of freelance authors and publishers to come to a contractual understanding on this issue are misplaced. This case alone shows that a variety of contractual arrangements are already in place between authors and publishers. In addition, as the Second Circuit noted, at least one of the respondent Publishers has already adopted the practice of requiring freelance writers to "execute an express transfer of copyrights" so as to allow the practice at issue here. (Pet. App. 3a n. 1)

In short, the Second Circuit's decision does not mandate the destruction of a single bit of information, and there is no reason to believe that the conduct of private contracting parties such as authors and publishers will have that effect.

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[6] Petitioners also incorrectly claim that "the organization led by respondent Tasini (the National Writers Union) has rejected the contractual solution in favor of class action litigation." (Pet. 16) The National Writers Union, in fact, has established an organization called the Publication Rights Clearinghouse, based on the ASCAP/BMI model, for the very purpose of *facilitating* a "contractual solution" by allowing publishers to purchase rights to re-publish and re-license articles of the sort at issue here. The class action suit in Boston to which petitioners refer, Pet. 16, involves an effort by the Boston Globe to obtain blanket retroactive re-publication permission—as a condition of any future work—without providing additional compensation. Of course, a failure to embrace the particular terms offered by the Globe does not imply rejection of any contractual solution, much less a desire to support "massive destruction of constitutionally protected information." (Pet. 17)

CONCLUSION

For the reasons stated above, the Petition for Writ of *Certiorari* filed by Petitioners should be denied.

Respectfully submitted,

PATRICIA A. FELCH, ESQ
Counsel of Record
BANNER & WITCOFF, LTD
10 South Wacker Drive
Suite 3000
Chicago, IL 60606
(312) 715-1000

DANIEL W. SHERRICK
8000 East Jefferson Ave.
Detroit, MI 48214
(313) 926-5216